In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1567

NEIL GALLAGHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 437 F. 2d 1191.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1971. A petition for rehearing was denied on March 16, 1971. On April 9, 1971 the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, prejudicial error arose from retained counsel's joint representation of petitioner and his co-defendant at trial.

424-639—71

STATEMENT

After a jury trial with his brother Thomas Gallagher in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to use interstate telephone communications in furtherance of a scheme to defraud, in violation of 18 U.S.C. 371.[1] He was sentenced to five years' imprisonment and a $1,000 fine. The court of appeals affirmed (Pet. App. A).

1. The evidence showed that between July and December 1967 Thomas Gallagher used stolen or altered American Express credit cards to obtain domestic airline tickets for flights originating in Chicago (App. 9, 17, 22, 25).[2] Thomas' method was to telephone the order to an airline serving Chicago and then use Mrs. Lois Seaver, an unindicted co-conspirator (Pet. App. A 3), to present to the airline clerk the bogus credit card together with a voucher signed in the name of the credit card holder. Thomas paid her for her work (App. 15–17) and thereafter sold the airline tickets at a fifty percent discount (App. 9–10). Using this method, Thomas, after several interstate telephone calls had been made, obtained airline tickets for the use of one Foster, a government informant residing in Fort Wayne, Indiana (App. 9–11, 14, 22).

During one telephone conversation with Thomas, Foster was told that petitioner was Thomas' brother

[1] Thomas Gallagher was convicted of the conspiracy and of seven substantive offenses (18 U.S.C. 371, 1343). His appeal was withdrawn (Pet. 7).

[2] "App." refers to the court of appeals appendix on file with the Clerk of this Court.

and that petitioner handled Thomas' New York operations (App. 11–12). Mrs. Seaver's husband testified that on one occasion he heard petitioner complain of Mrs. Seaver's loss of a credit card. Petitioner said that he "could have got rid of" the card in New York (App. 24). In addition, one Poppelier., to whom Thomas had described his airline ticket procurement operation, testified that petitioner told Poppeliers that he operated similarly in New York City, that he obtained the credit cards from Thomas, and that he would soon proceed there with ten American Express credit cards. Petitioner stated that the cards would be disposed of profitably and that Thomas, as a result, would be able to pay his hotel bill (App. 17–20).

tioner. His brother Thomas also had separate ap-

2. In May 1969, the court appointed counsel for petipointed counsel. On June 25, 1969, Harvey Powers filed an appearance as additional counsel for both Thomas and petitioner. When trial commenced on September 8, 1969, the separate counsel were permitted to withdraw and Mr. Powers undertook the joint representation of Thomas and petitioner (Pet. 4, App. 3–5).

After the second government witness, Foster, had finished testifying on direct, Mr. Powers made a motion for a mistrial based on an asserted conflict of interest in the joint representation, since Foster's testimony had been more inculpatory of Thomas than of petitioner. Mr. Powers claimed that this placed him in a "hard position" as to whether the cross-examination of Foster should be focused on showing the lack

of evidence against petitioner, to Thomas' detriment (Pet. 4, App. 13). The court denied the motion (App. 13), and counsel then proceeded with the cross-examination of Foster and thereafter cross-examined other government witnesses.

After the government and the defense rested, an overnight adjournment was taken. The following morning, petitioner indicated to Mr. Powers that during the adjournment he had been beaten by unknown assailants who had sought to intimidate him and that he wished to reopen his case and testify. Thomas, according to Mr. Powers, objected to such reopening. Mr. Powers indicated that he did not know what to do. Before the court ruled, petitioner collapsed. An attending nurse found his temperature and blood pressure normal but detected the smell of alcohol on his breath. Petitioner claimed to have a history of kidney problems and was removed by ambulance (App. 26–27). A doctor was appointed to examine him (App. 6). After a weekend adjournment, petitioner withdrew his request for reopening, and the case then proceeded without further incident to verdict (App. 28).

ARGUMENT

Petitioner contends that there was a conflict of interest between his brother and himself and that Mr. Powers' motion for a mistrial should have been granted (Pet. 8–12). He does not specify the particulars of any prejudice, beyond the vague allegations that counsel did not know whether to stress to the jury the facts which were especially relevant to the guilt or innocence of one brother or the other. Neither

brother, at trial, made an effort to implicate the other, and petitioner even now makes no claim that he was prevented from testifying if he had so desired. Counsel cross-examined the government's witnesses on behalf of each defendant (*e.g.*, App. 16–17, 20, 22, 25). It is well settled that joint representation is not forbidden and that a mistrial or severance should be granted only when it is shown that a genuine conflict of interest exists among the jointly represented defendants which will result in prejudice. *E.g., Glasser* v. *United States,* 315 U.S. 60; *United States* v. *Sheiner,* 410 F. 2d 337, 342 (C.A. 2), certiorari denied, 396 U.S. 825; *United States* v. *Rubin,* 433 F. 2d 442 (C.A. 5); *United States* v. *Williams,* 429 F. 2d 158, 161 (C.A. 8); *Duran* v. *United States,* 413 F. 2d 596, 599 (C.A. 9); *Fryar* v. *United States,* 404 F. 2d 1071, 1073 (C.A. 10), certiorari denied, 395 U.S. 964. As the court below held (Pet. App. A. 5–7), no such conflict was shown here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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